Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-907

COMPAÑIA MARITIMA SAN BASILIO, S.A.; P.D. MARCHESSINI AND CO. (HELLAS), LTD.; P.D. MARCHESSINI AND CO. (NEW YORK), INC., and SS "EURYBATES", her boats, etc.,

Petitioners,

—against—

PANAGANGELOS ANTYPAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari (the "Writ") issue to review the dispositions of the United States Court of Appeals for the Second Circuit ("Court of Appeals") set forth in the Jurisdictional Statement, *infra*.

Opinions Below

There were three opinions below, all of which were reported. The panel majority opinion at the Court of Appeals, 541 F.2d 307 (2 Cir., Aug. 2, 1976; per Mr. Justice Clark), is appended hereto at pages A 1-6. The dissenting opinion of Circuit Judge Van Graafeiland, 541 F.2d at 310, is appended at pages A 6-8. The opinion of the District Court, 1975 A.M.C. 2658 (SDNY, 1975), is appended at pages A 9-10.

No opinion accompanied the orders of the Court of Appeals (a) denying rehearing, and (b) denying rehearing *en banc.*

Jurisdictional Statement

Petitioners seek review of a judgment and two post-judgment orders of the Court of Appeals.

On August 2, 1976*, the Court of Appeals, by divided vote, reversed a final judgment of the United States District Court for the Southern District of New York (Metzner, D.J.; the "District Court"). The District Court had declined to exercise jurisdiction and had dismissed the Complaint upon grounds of *forum non conveniens.*

On October 6, 1976, the Court of Appeals denied Petitioners' separate motions for: (a) rehearing before the original panel, upon the ground that relevant record evidence had been overlooked ("Order Denying Rehearing"), and (b) *en banc* rehearing ("*En Banc* Denial").

The jurisdiction of this Court to issue the Writ is found at 28 USC § 1254(1).

Questions Presented

1. Is there a conflict between the opinion below of the Second Circuit and the precedent of the Fifth Circuit as to the significance of the factor of a local husbanding agent for purposes of Jones Act jurisdiction?

2. Does the opinion below:

(a) properly apply the Jones Act jurisdictional criteria set forth in *Hellenic Lines, Ltd.* v. *Rhoditis,* 398 U.S. 306 (1970) and *Lauritzen* v. *Larsen,* 345 U.S. 571 (1953)?

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*All dates in this Jurisdictional Statement are both dates of judgment (order) and dates of entry.

(b) impermissably extend Jones Act jurisdiction under such criteria?

3. In reversing the factual finding of the District Judge that the vessel's owners were all foreign citizens, did the Court of Appeals:

(a) improperly disregard its own prior opinion in a separate action holding that the vessel's owners were all foreign citizens, when there was no change of circumstances since such opinion?

(b) improperly disregard the "clearly erroneous" rule of FRCP 52(a), under those circumstances and when, in addition, the Court of Appeals based its reversal solely upon a fifteen-year-old deposition when factual circumstances thereafter changed?

(c) improperly refuse to grant rehearing under FRAP 40(a) when such factual errors were alleged in a timely petition?

(d) improperly refuse to grant rehearing *en banc* under FRAP 35(a) to reconcile intra-circuit precedent upon a timely suggestion for such rehearing *en banc*?

4. Did the Court of Appeals improperly hold that Jones Act jurisdiction should be exercised over parties who did not employ the allegedly injured seaman?

Statutes and Rules Involved

1. This case involves the application of the Jones Act, 46 USC § 688. In parts pertinent to this Petition, the Jones Act provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . .".

, To appreciate the jurisdictional sweep of the Court of Appeals' holding herein, consideration of §§ 15 and 18 of the Shipping Act of 1916, 46 USC §§ 814 and 817, is also involved herein, together with § 2(a) of P.L. 93-605, 46 USC § 804. These statutes are appended at pages B 1-9 in view of their length. (Supreme Court Rule 23[d].)

2. This case also involves the duties imposed upon any Court of Appeals by Rule 52(a) of the Federal Rules of Civil Procedure ("FRCP"), and by Rules 35(a) and 40(a) of the Federal Rules of Appellate Procedure ("FRAP").

FRCP 52(a) provides, in pertinent part:

> "Findings of fact shall not be set aside unless clearly erroneous . . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

FRAP 35(a) provides, in pertinent part:

> "[An *en banc*] rehearing is not favored and ordinarily will not be ordered except:
>
> (1) when consideration by the full court is necessary to secure or maintain uniformity in its decisions, or
>
> (2) when the proceeding involves a question of exceptional importance."

FRAP 40(a) provides, in pertinent part:

> "The petition [for rehearing] shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended . . .".

Statement of the Case

1. *Basis for Federal Jurisdiction*

Respondent appears to base subject-matter jurisdiction on the Jones Act or "the general maritime law". (Complaint, ¶¶ 6-8; 2a.)* Petitioners deny the existence of subject-matter jurisdiction and *in personam* jurisdiction. (Answer, ¶¶ Sixth-Eighth; First, Sixth and Seventh Affirmative Defenses; 5-6, 8-9a.) The District Court held that jurisdiction was not present (A 9-10); the Court of Appeals, by divided vote, reversed (A 1-8).

2. *Results Below*

Making detailed findings of fact (A 9-10), the District Court granted Petitioners' motion for summary judgment and dismissed the Complaint "on the ground of *forum non conveniens*" (A 10), concluding:

> ". . . the contacts of the defendants with the United States as measured by the standards set forth in *Lauritzen* v. *Larsen*, 345 U.S. 571 . . . (1953), are minimal." (A 9.)

Making its own findings of fact (A 3-5), the Court of Appeals reversed upon the following grounds:

> "Our examination of the record reveals substantial contacts sufficient to support jurisdiction under *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970), and we reverse." (A 2; footnote omitted.)

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* Two appendices were filed in the Court of Appeals. That filed by Respondent (Appellant below) was paginated with an "a" following the page number. That filed by Petitioners (Appellees below) capitalized the letter and placed it before the number. (*E.g.*, A 13). Respondent's usage below will be followed here; Petitioners' usage will be changed to "Pet. App." to avoid confusion with Appendix A to this Petition.

> "We hold that the District Court clearly erred in finding the contacts to be insubstantial and in failing to apply the Jones Act." (A 5.)

The dissenting judge disagreed that the District Court's findings of fact were "clearly erroneous" and found no support in the record for critical jurisdictional findings of fact made by the majority. (A 6-7.) The dissenting judge also concluded that, "under any version of the facts herein", the action could only proceed against the employer of plaintiff and not against the remaining defendants below. (A 6, n.1.)

One of the critical jurisdictional findings by the majority related to the nationality of the owner's stockholders.* Relying solely on the answers to ten short questions at a deposition, the majority found:

> "Apparently, each [stockholder] was a citizen of the United States.
>
> • • •
>
> It appears that at least some of the stockholders of the shipowner, San Basilio, are American citizens." (A 4 and n. 5; see A 7, n. 3.)

The dissenting judge called this finding "inexplicable". Pointing out that the deposition was taken over ten years *before* the accident alleged herein, the dissenting judge noted that the facts had changed in the intervening period. Based on such change, he also pointed out that the Second Circuit itself, in another action,** had held that the owner's stockholders "were citizens and residents of Greece". (A 6-7.) He concluded:

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* The majority also found that the facts of operational control and revenue collection supported jurisdiction. (A 8.) The District Court found to the contrary. (A 9-10.) See Points II and V, *infra*.

** *Garis* v. *Compañia Maritima San Basilio, S.A.*, 386 F.2d 155 (2 Cir. 1967).

> "There is nothing in the record to indicate that the situation has changed since that opinion was written." (A 7; see 13, 22a.)

Based solely on the finding which the dissenting judge found "inexplicable", the majority concluded:

> "This contact, in and of itself, has been held sufficient to support jurisdiction under the Jones Act." (A 5; citation omitted.)

3. *Facts*

Plaintiff claims under the Jones Act for injuries allegedly sustained on the high seas in June 1972, and also seeks maintenance and cure. It is undisputed that plaintiff was and is a Greek citizen and resident; that he signed on board the vessel under Greek articles; that he boarded in Rotterdam, and that he remained on the vessel until treatment in and repatriation from Japan. It is further undisputed that the alleged injury occurred on a voyage from Hamburg to the Far East. (1a; Pet. App. 23-24, 35-38.)

The remaining facts are the subject of conflicting findings in the courts below. Unless otherwise stated, what follows are the findings of the District Court as to each of the three defendants (Petitioners herein).

Defendant owner is a Panamanian corporation. None of its stock is owned by citizens of the United States. At all relevant times, the owner ran a liner service from Europe to the Far East under the name "Marchessini Lines". (22-23, 33-38a; see n. 5 to majority opinion, A 4.)

The vessel was registered under the laws and flag of Greece. None of its crew was a resident or citizen of the United States. (Pet. App. 23-24, 41-43.)

Defendant P. D. Marchessini & Co. (Hellas) Ltd. is a limited company organized under the laws of Greece. It

never had an office or conducted any business in the United States. It never acted as plaintiff's employer. At all relevant times, it acted as the ship's agent whenever it called at a Greek port. (24-25a.)

Defendant P. D. Marchessini & Co. (New York) Inc. is a New York corporation having a place of business in New York City. Its stock is entirely owned by citizens of the United States. However, it never acted as plaintiff's employer and did not have officers, directors or shareholders in common with the owner. Pursuant to written agency agreement with the owner's general agent in London, it acted as the vessel's limited agent in New York to solicit cargo, collect freight, allocate tonnage, fix rates and space sailings, pay disbursements, place advertisements in trade journals, and appoint local United States agents. (16-18, 77-79a; see Exhibits 1-3 and 8 of Respondent's "Exhibits in Support of Opposing Affidavit".)*

Summary of Argument

Under the illustrative criteria of Rule 19(1)(b) of this Court, there appear to be five separate reasons to issue the Writ under the circumstances of this case.

It appears that the majority of the Court of Appeals misapplied the "clearly erroneous" review criteria of FRCP 52(a). The majority, upon a nonexistent record, substituted its own factual findings for those of the District Court and ignored the record relied on by the District Court. Petitioners submit that, in the words of Rule 19(1)(b), the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." (Point I, *infra.*)

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* Such Exhibits were not a part of any appendix below.

The Court of Appeals also ignored the effect of *stare decisis.* Jurisdictional facts as to the owner had been previously found by a separate panel of the Second Circuit in a prior action, and circumstances had not changed since then. Findings in a separate action before the District Court were also disregarded. Under the same criterion of Rule 19(1)(b), the Writ should be granted. (Point II, *infra.*)

At the very least, a simple panel majority should not have changed the law of the Second Circuit. The conflict with prior intra-circuit precedent should have been referred to the Court of Appeals *en banc.* Again, the portion of Rule 19(1)(b) quoted above justifies the Writ. (Point III, *infra.*)

Even if the Court of Appeals acted upon a proper record and with the proper procedure, questions for review are presented to this Court. A square conflict appears to be presented between the holding of the Second Circuit herein and that of the Fifth Circuit in *Merren* v. *A/S Borgestad,* 519 F.2d 82 (5 Cir. 1975), within the meaning of Rule 19(1)(b). (Point IV, *infra.*)

Moreover, the result reached impermissibly expands Jones Act jurisdiction "in a way in conflict with applicable decisions of this court" (Rule 19[1][b]), particularly *Hellenic Lines Ltd.* v. *Rhoditis,* 398 U.S. 306 (1970) and *Lauritzen* v. *Larsen,* 345 U.S. 571 (1953). (Point V, *infra.*)

ARGUMENT

I.

The Court of Appeals Misapplied the "Clearly Erroneous" Standard of Review.

The Writ may issue to examine a Court of Appeal's compliance with the "clearly erroneous" standard of FRCP 52(a). *Zenith Radio Corp.* v. *Hazeltine Research,* 395 U.S. 100, 108 (1969). Speaking for the entire Court on this issue*, Mr. Justice White instructed Courts of Appeals to give "deference to the findings of the trial judge" (395 U.S. at 122), and concluded:

> ". . . [A]ppellate courts must constantly have in mind that their function is not to decide factual issues de novo.
>
> • • •
>
> The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed'." (395 U.S. at 123; citations omitted.)

Here, the Court of Appeals did not reach its conclusion "on the entire evidence". Indeed, it reversed the District Court's factual findings upon no evidence at all. The dissenting opinion below eloquently characterized the only "proof" relied on by the majority as to the determinative issue of nationality of the owner's stockholders: "[t]he unsatisfactory excerpt from this mysteriously unidentified deposition". (A 7.)

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* Mr. Justice Harlan concurred with this portion of the opinion. (395 U.S. at 141.)

The Court of Appeals compounded its errors in the Order Denying Rehearing by failing to take the opportunity afforded by FRAP 40(a) to correct its erroneous factual conclusions. *Cf. Art Metal Works* v. *Abraham & Straus,* 70 F. 2d 641 (2 Cir. 1934); *vacated upon rehearing,* 107 F. 2d 944 (2 Cir. 1939); *cert. denied,* 308 U.S. 621 (1939); *rehearing denied,* 309 U.S. 696 (1940); *Iravani Mottaghi* v. *Barkey Importing Co.,* 244 F. 2d 238; *on rehearing,* 244 F. 2d 260 (2 Cir. 1957); *cert. denied,* 354 U.S. 939 (1957); *Reeve Bros.* v. *Guest,* 132 F. 2d 778 (5 Cir. 1943). This Court should exercise its supervisory power and grant the Writ.

II.

The Court of Appeals Ignored the Effect of Stare Decisis.

All three opinions below recognize that certain factual issues involving owner's ownership and operation of vessels were resolved by the Second Circuit in *Garis* v. *Compañia San Basilio, S.A.,* 386 F .2d 155 (2 Cir. 1967). (A 3, n. 3; A 7; A 10.) Upon affidavits, interrogatories and a court-ordered deposition, the District Court and the Court of Appeals unanimously concluded that "discretionary jurisdiction should be declined" upon the facts then found. (386 F. 2d at 156-157.) In particular, *Garis* established that defendant owner's vessels were not controlled by defendant, P. D. Marchessini & Co. (New York), Inc., through interrelationship, agency agreement, or otherwise. (*Ibid.*)

Contrast this holding with that of the panel majority below (particularly A 3-5). One is left with the distinct impression that the same court could not have decided both actions, or that the same parties could not have been before the court. Unfortunately, the court and the defendants before the court are identical.

The same impression is left when the opinion below is contrasted with *P. D. Marchessini & Co. (New York)* v. *Pacific Marine Corp.*, 227 F. Supp. 17 (SDNY, 1964). The District Court therein held that an agency agreement containing terms similar to those involved in this record conferred no power to control vessel operations. (*Cf.* 227 F. Supp. at 18-20 *with* A 3-5.) There, as here, P. D. Marchessini & Co. (New York), Inc. acted as local husbanding agents alone with no contact with, or power over, vessel disbursements and receipts outside the United States.

Again, in the exercise of its supervisory powers, this Court should issue the Writ. As the Fifth Circuit commented in *Aloe Creme Laboratories, Inc.* v. *Francine Co., Inc.*, 425 F. 2d 1295 (5 Cir. 1970):

> "The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time." (425 F. 2d at 1296.)

In the alternative, the Writ is justified by an intra-circuit conflict with *Garis* created by the decision below. *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950).

III.

En Banc Consideration Should Have Been Ordered.

The panel majority recognized that it was virtually overruling *Garis* v. *Compañia Maritima San Basilio, S.A., supra.* (A 3, n. 3; see A 7.) Such a course was beyond the competence of a panel and could only be ordered by the Court of Appeals sitting *en banc. United States* v. *Olivares-Vega*, 495 F. 2d 827, 829 (2 Cir. 1974); *United States ex rel. Ortiz* v. *Fritz*, 476 F. 2d 37, 40 (2 Cir. 1973); see *Textile Mills Securities Corp.* v. *Commissioner*, 314

U.S. 326, 335 (1941); *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 270 (1953; Frankfurter, J., concurring); *Saper* v. *City of New York*, 168 F. 2d 268 and *Carter* v. *United States*, 168 F. 2d 272 (2 Cir. 1948; companion cases). The Tenth Circuit stated the reason for the rule in *United States* v. *United States Vanadium Corp.*, 230 F. 2d 646 (10 Cir. 1956); *cert. denied*, 351 U.S. 939 (1956):

> "We feel that one panel of the court should not lightly overrule a decision by another panel. To do so puts the law into a state of flux, and no one can tell what the law will be until the composition of the court is determined." (230 F. 2d at 649.)

Accord, In re Central Railroad Co. of New Jersey, 485 F. 2d 208, 211 (3 Cir. 1973; *en banc*); *cert. denied*, 414 U.S. 1131 (1974); *McClure* v. *First National Bank of Lubbock, Texas*, 497 F. 2d 490, 492 (5 Cir. 1974).

The Court of Appeals compounded its error in the *En Banc* Denial, rejecting Petitioner's suggestion under FRAP 35(a). This Court can and should issue the Writ to supervise the administration of the Court of Appeals and insure consistent circuit-wide precedent. *Western Pacific, supra*, 345 U.S. at 250, 260; see *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 624 (1974).

IV.

There Is Now a Conflict Between the Second and Fifth Circuits as a Result of the Decision Below.

In the six years since *Rhoditis* added the "base of operations" test, at least two circuit courts have considered the effect of a local shipping agent under a "husbanding" agreement upon Jones Act jurisdiction. They divide.

The decision below is apparently the Second Circuit's first and only holding that the presence of a local shipping

agent brings the foreign owner within Jones Act jurisdiction under *Rhoditis*. Considering the same factor in the light of *Rhoditis*, the Fifth Circuit has twice reached the opposite result.

In *Yohanes* v. *Ayers Steamship Co.*, 451 F.2d 349 (5 Cir. 1971); *cert. denied*, 406 U.S. 919 (1972), the Court declined to exercise Jones Act jurisdiction even though one defendant was a "domestic corporation which acted as the general agent for the time-charterer of the vessel". (451 F.2d at 350.) In *Merren* v. *A/S Borgestad*, 519 F.2d 82 (5 Cir. 1975), the same result followed under precisely the same facts of agency as herein:

> "Finally, *Rhoditis* adds another factor—the shipowner's base of operations. In the present case the documents available to the trial judge demonstrated defendants maintained no offices in the United States and were affiliated with no organization in the United States, *except to the extent of having shipping agents who contracted in American ports for the use of the ship's services.*" (519 F.2d at 83; emphasis added.)

This factor was held insubstantial by the Fifth Circuit and determinative below.* The Writ should issue because of a conflict between the circuits.

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* Petitioners submit that the Fifth Circuit rule is the better practice. Since any foreign vessel calling at a United States port requires a local husbanding agent to collect freights and make disbursements, the Second Circuit rule newly announced below will have significant docket consequences on overworked district courts within that Circuit if allowed to stand.

V.

The Decision Below Conflicts With the *Rhoditis* Decision of This Court.

In *Hellenic Lines, Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970), this Court added "base of operations" to the sevenfold jurisdictional test of *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953). In particular, the Court described the "base of operations" test as follows:

> "the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States." (398 U.S. at 310.)

The Court of Appeals improperly applied the *Rhoditis* tests and reached a result which this Court should not condone. As discussed by the dissent below (see also Point I), the stockholders of the owner were exclusively foreign. The other two "contacts" with the United States relied on by the majority, operational control and flow of funds (see A 5), are insubstantial under *Rhoditis*.

The majority concluded that defendant P. D. Marchessini & Co. (New York), Inc., exercised "direct control" of the vessel upon consideration of five factors: (a) applicability of the Shipping Act of 1916; (b) the requirement of a tariff filed with the Federal Maritime Commission ("FMC"); (c) the agency agreement herein with the London general agent; (d) advertisements, and (e) a "c/o" address for owner. (A 3-5.) The majority sharply disagreed with the evaluation of these factors by the District Court in determining the factual question of control. (*Cf.* A 3-5 *with* A 9-10.)

The District Court properly evaluated the factors. (a, b) Every common carrier in commerce with the United States

is subject to FMC jurisdiction and must file tariffs. 46 U.S.C. §§ 804, 814, 817 (B-19). Whether foreign flag or not, any carrier calling at any American port would, by such call alone, subject itself to Jones Act jurisdiction if the majority's reasoning prevailed. Such factors were given undue weight by the Court of Appeals in reversing the findings of the District Judge. (c) The agency agreement herein is merely a "husbanding" agreement in which local agents perform nonmaritime functions in the localities alone. No element of control is involved, as the agreement itself indicates.* (d) Solicitation of business through advertising to the trade, including Americans in the trade, is commonplace among foreign flag carriers. The listing of a local agent in such advertisements could not possibly establish that the local agency controlled the vessel. (See excerpts from the Journal of Commerce, August 13, 1976, appended to the petition for rehearing below.) (e) A "c/o" address for the owner unquestionably establishes a limited agency of the individual at that address. However, the conclusion of control by the agent because of such a listing is an obvious *non sequitur*.

As to flow of funds, the Court of Appeals concluded that certain funds relating to the vessel were received in New York and certain disbursements made from New York. Again (see [c] above), such an arrangement applies to all *local* receipts and disbursements and is part of a standard "husbanding" agreement. It expressly does not apply to worldwide receipts and disbursements and does not demonstrate control from New York.

Accordingly, *Rhoditis* has been misapplied by the Court of Appeals, resulting in an unwarranted expansion of

* For an analysis of a similar agreement involving the same party, see *P. D. Marchessini & Co. (New York), Inc.* v. *Pacific Marine Corp.*, 227 F. Supp. 17 (SDNY, 1964).

Jones Act jurisdiction. It should not be condoned by this Court.*

Conclusion

For any of the reasons advanced above, the Writ should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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* Indeed, the Court of Appeals did not appear to consider the factors enumerated in *Lauritzen* and *Rhoditis per se*. For convenience, they are here listed:

Factor	*Rhoditis*	*This Action*
1. Place of tort	U.S. port	High seas
2. Law of flag	Greek	Greek
3. Plaintiff's allegiance	Greece	Greece
4. Shipowner's allegiance	U.S.	Greece
5. Employment contract	Greek law	Greek law
6. Foreign forum	Available	Available
7. Law of forum	U.S.	U.S.
8. Owner's base of operations	(a) U.S. resident; (b) New York and New Orleans offices	(a) Foreign resident; (b) Foreign offices

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 726—September Term, 1975.

(Argued April 13, 1976 Decided August 2, 1976.)

Docket No. 75-7672

PANAGANGELOS ANTYPAS,

Plaintiff-Appellant,

v.

CIA MARITIMA SAN BASILIO, S.A. and P. D. MARCHESSINI AND CO. (HELLAS) LTD. and P. D. MARCHESSINI AND CO. (NEW YORK) and the SS EURYBATES, her boats, engines, tackle and apparel,

Defendants-Appellees.

Before:

CLARK, *Associate Justice,**
MANSFIELD and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from the decision and order of the United States District Court for the Southern District of New York granting Defendants-Appellees' motion for dismissal declining jurisdiction on the basis of *forum non conveniens.* The judgment is reversed.

HERBERT LEBOVICI, Lebovici and Safir, New York, New York, *for Plaintiff-Appellant.*

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* United States Supreme Court, Retired, sitting by designation.

Appendix A

ALVIN L. STERN, Poles, Tublin, Patestides & Stratakis, New York, New York (John G. Poles and Alan Van Praag, of counsel), *for Defendants-Appellees.*

MR. JUSTICE CLARK:

This is an appeal from an order of the District Court dismissing appellant's complaint seeking recovery for maintenance and cure, and injuries allegedly sustained in 1972 while employed as a seaman aboard the Greek flag vessel *Eurybates.* The injury allegedly occurred while the vessel was on the high seas proceeding on a voyage from Hamburg to the Far East and back to Europe. Jurisdiction is predicated on the Jones Act, 46 U.S.C. 5688.[1] The suit was dismissed on the ground of *forum non conveniens* because the contacts of the employer as measured by *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), are minimal. Our examination of the record[2] reveals substantial contacts sufficient to support jurisdiction under *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970), and we reverse.

The District Court found: "The only United States contact in this case is the presence here of defendant P. D. Marchessini & Co., (New York) Inc., which acted as a ship's agent while Cia. Maritima San Basilio S. A. vessels were in United States ports . . . The evidence submitted by plaintiff is not sufficient to support its claim that the shipping line is controlled by American citizens from New York. In fact, plaintiff has failed to distinguish the facts relating to the ownership and operation of the S.S. "Eurybates" by Cia. Maritima San Basilio, S. A. from those found to be true concerning its ownership and oper-

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[1] The statute confers rights upon "Any seaman who shall suffer personal injury in the course of his employment . . . ."

[2] Appellant's "Exhibits in Support of Opposing Affidavit".

Appendix A

ation of another vessel in *Garis* v. *Compania San Basilio S.A.*, 386 F. 2d 155 (2d Cir. 1967). Opinion, November 14, 1975 (unpublished).[3]

Our examination of the record indicates a direct connection between the *Eurybates,* the vessel on which appellant was injured, the appellee shipowner, Cia. Maritima San Basilio, S.A. (San Basilio), a Panamanian corporation, and the appellee P. D. Marchessini & Co., (New York) Inc. During 1972, the *Eurybates* operated alternatively on the two liner services constituting the Marchessini Lines, one service from the United States to Europe and back, and the other from the United States to the Far East and back. The operation of the Marchessini Lines, a trade name used by San Basilio and Sociedad Maritima San Nicholas, S.A., was conducted by P. D. Marchessini & Co. from its offices in New York.[4] All of the stock of San Basilio and Sociedad Maritima San Nicholas, S.A., was owned by Panaghi D. Marchessini, his wife, Helen, and

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[3] In *Garis* v. *Cia. San Basilio,* 261 F. Supp. 917 (S.D.N.Y. 1966), aff'd, 386 F. 2d 155 (2d Cir. 1967), the District Court dismissed a complaint for personal injuries by a Greek seaman sustained aboard a vessel owned by Cia. Maritima San Basilio, S.A., the same defendant that appears as appellee herein, on the grounds that the defendant had insufficient contacts with the United States to justify retaining jurisdiction. The opinion is distinguishable since the proof here is different from that relied upon by the parties there. Moreover, the court's reasoning in *Garis* largely has been modified by the subsequent decisions of *Hellenic Lines Ltd.* v. *Rhoditis, supra,* and *Moncada* v. *Lemuria Shipping Co.,* 491 F. 2d 470 (2d Cir.), *cert. denied sub nom. Ekberg Shipping Corp.* v. *Moncada,* 417 U.S. 947 (1974).

[4] Appellees admit the P. D. Marchessini & Co. (New York) is a New York corporation having its place of business at 26 Broadway, New York, New York, and that all of its stock is owned by American citizens. Appellees' Brief at 4.

two sons, Dimitri and Alexander. Apparently, each was a citizen of the United States.[5]

The "joint service" operation under the name "Marchessini Lines" was subject to the Shipping Act of 1916, 46 U.S.C. 801, *et seq.*, as well as the jurisdiction of the Federal Maritime Commission. A copy of the agreement filed with the Maritime Commission between the two parties trading as Marchessini Lines is in the record. This agreement provides for the delegation to P. D. Marchessini and Co. Ltd. (London), a general agency, and empowers it to redelegate to its subagent in the United States full and complete responsibility for the booking and solicitation of cargo and passengers, and collection of freight and passenger revenues for account of Marchessini Line vessels, including the *Eurybates*. Pursuant to this agreement, P. D. Marchessini & Co. (New York) was given the power to fix rates, allocate tonnage and space sailings.

The record also includes copies of advertisements inserted in shipping journals calling attention to the Marchessini Lines, soliciting business therefor, and indicating the dates of sailings of various vessels, including the *Eurybates*. One advertisement includes a listing of agents in Philadelphia, Baltimore, Charleston, Tampa and Los Angeles and designates Marchessini & Co. (New York) as "USA General Agents." The Marchessini Lines advertised also in the New York Times, describing its service as

[5] At deposition Panaghi D. Marchessini testified that he, his wife and his two sons were stockholders of Cia. Maritima San Basilio, S. A. and Sociedad Maritime San Nicholas, S.A., and that each is a citizen of the United States. Appellant's Exhibit 12 in Support of Opposing Affidavit. On April 21, 1976, appellee filed a certified copy of a certificate of loss of nationality of the United States, stating that Panaghi D. Marchessini "made formal renunciation of American nationality" on December 27, 1962. Although this may rise a question about his nationality, it does not bear upon the status of his wife and sons who own stock in Marchessini & Co. (New York).

"linking North Europe, U.S. East Coast and Far East" and listing the address of P. D. Marchessini & Co. at 26 Broadway, N.Y. The record includes also tariffs filed by P. D. Marchessini & Co. (New York) with the Federal Maritime Commission on sailings from Atlantic and Gulf ports of the United States to Far East and European ports. In addition, the record includes samples of accounts prepared by P. D. Marchessini & Co. (New York), for vessels of the Marchessini Lines and an extract from the "Owners" volume of *Lloyd's Register of Shippers* indicating that the owner of the *Eurybates* could be contacted "c/o of P. D. Marchessini & Co. (New York), 26 Broadway".

We find these contacts between the transaction involved and the United States to be substantial and that Jones Act jurisdiction exists. It appears that at least some of the stockholders of the shipowner, San Basilio, are American citizens. This contact, in and of itself, has been held sufficient to support jurisdiction under the Jones Act. *Bobolakis* v. *Cia. Panamena Maritima, San Gerassimo,* 168 F. Supp. 236 (S.D. N.Y. 1958). In addition, however, the record here shows that Marchessini Lines was operated by P. D. Marchessini & Co. from New York and that the *Eurybates* was under its direct control. Moreover, the earnings from the vessel appear to be collected in New York and the expenses of the vessel paid from New York.

These contacts are substantial and predominate over such factors as the ship's flag, the place of incorporation of the shipowner, and the seaman's nationality. *See Hellenic Lines Ltd.* v. *Rhoditis,* 398 U.S. 306 (1970); *Pavlou* v. *Ocean Traders Marine Corp.,* 211 F. Supp. 320 (S.D.N.Y. 1962). We hold that the District Court clearly erred in finding the contacts to be insubstantial and in failing to apply the Jones Act. Where the Jones Act applies, this Court has held that a district court has no power to dismiss on grounds of *forum non conveniens. Bar-*

tholomew v. *Universe Tankships, Inc.*, 263 F. 2d 437, 443 (2d Cir. 1959). Accordingly, we reverse.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

Although I believe that the District Court was correct in holding the Jones Act inapplicable to all three defendants I would, nonetheless, have been willing to concur with my colleagues in reversing as to plaintiff's employer had they held simply that the decision as to it should await more complete development of the facts. However, when the majority, finding facts to have been established which, at best, are in dispute, holds the Jones Act applicable to all defendants I have no alternative but to record my dissent.[1]

The Eurybates, the vessel on which appellant was injured, was owned by Cia. Maritima San Basilio S.A., a Panamanian corporation. In support of its application to dismiss, Maritima submitted the affidavit of its vice president which stated:

> "None of the directors or shareholders of CIA MARITIMA SAN BASILIO are [sic] residents or citizens of the United States of America."[2]

In the face of this unequivocal statement and the District Court's finding in support thereof, I find inexplicable the majority's statements that some or all of these stockholders are American citizens. The deposition referred to in foot-

[1] Since the Jones Act applies only as between employee and employer, *Mahramas* v. *American Export Isbrandtsen Lines, Inc.*, 475 F. 2d 165, 170 (2d Cir. 1973); it is clear, under any version of the facts herein, that the complaint was properly dismissed as to two of the named defendants.

[2] A similar affidavit was filed by one of the attorneys for the defendants.

note 4 of the majority opinion was not taken in this case. Indeed, we are not informed when and in what action it was taken, except that apparently it antedated 1962. The unsatisfactory excerpt from this mysteriously unidentified deposition, upon which my brothers rely, is set forth in its entirety in the margin.[3] In it, Panaghi D. Marchessini testifies that he, his wife and two sons, are the shareholders of some unnamed corporation and that they are American citizens. At least five years after this testimony was taken, we stated in *Garis* v. *Compania Maritima San Basilio, S.A.*, 386 F. 2d 155, 157 (2d Cir. 1967) (per curiam) that Maritima's "officers, directors, and stockholders were citizens and residents of Greece". There is nothing in the record to indicate that the situation has changed since that opinion was written.

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[3] EXAMINATION BY MR. SALEM:

Q. Will you please state your full name for the record?
A. My full name is Panaghi D. Marchessini.
Q. Are you an American citizen, Mr. Marchessini?
A. Yes, I am.

• • • • •

Q. Do you know who the stockholders of that corporation are?
A. Yes.
Q. Who are they?
A. The stockholders are myself and my family.
Q. Who is that?
A. My sons and my wife.
Q. Your two sons?
A. My two sons and my wife.
Q. And your wife is, of course, an American citizen?
A. She is.
Q. And your two sons are American citizens?
A. They are.
Q. This situation has existed for a number of years?
A. What situation?
Q. Stock ownership.
A. Yes, many years.

Appendix A

When a complaint asserts a substantial claim under the Jones Act, the District Court has jurisdiction to determine whether in fact the Act does provide the rights upon which plaintiff relies. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359 (1959). The question before the District Court, therefore, was not one of jurisdiction. Rather, it was whether plaintiff's cause of action is "well founded in law and in fact", *Lauritzen* v. *Larsen*, 345 U.S. 571, 575 (1953); i.e. whether the Jones Act is applicable to any of the appellees under the facts of the case. *Voyiatzis* v. *National Shipping & Trading Corp.*, 199 F. Supp. 920, 922 (S.D.N.Y. 1961). If the Jones Act does apply, appellees' liability must be determined in accordance with its broadly remedial substantive provisions. *Dassigienis* v. *Cosmos Carriers & Trading Corp.*, 442 F. 2d 1016, 1017 (2d Cir. 1971).

Although challenges to Jones Act coverage are usually by motion to dismiss for lack of subject matter jurisdiction, Gilmore & Black, The Law of Admiralty, 481 (1975), appellees' motion below was for summary judgment. Whatever the form of the motion, it was not the proper medium for deciding disputed questions of fact. *Bernstein* v. *Universal Pictures, Inc.*, 517 F. 2d 976, 979 (2d Cir. 1975); *Heyman* v. *Commerce & Industry Insurance Co.*, 524 F. 2d 1317 (2d Cir. 1975). The facts either warrant the application of the Jones Act or they do not, *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437, 443 (2d Cir.) cert. denied, 359 U.S. 1000 (1959); and the resolution of disputed questions of fact is for the trial. *Rodriguez* v. *Solar Shipping, Ltd.*, 169 F. Supp. 79 (S.D.N.Y. 1958). In my opinion, it is as erroneous to hold, on the basis of disputed pre-trial affidavits, that appellees' duties are fixed by the Jones Act as it would be to hold that they are not. Insofar as my brothers make a present determination that the Act is applicable to the three appellees, I respectfully dissent.

Appendix A

PANAGANGELOS ANTYPAS, *Plaintiff*.

v.

CIA. MARITIMA SAN BASILIO S.A., P. D. MARCHESSINI AND CO., (HELLAS) LTD., P. D. MARCHESSINI AND CO., (NEW YORK) INC., AND *S. S. EURYBATES*, HER ENGINES, ETC., *Defendants*.

United States District Court,
Southern District of New York,
November 14, 1975.

73 Civ. 4205 (CMM).

JURISDICTION—134. Suits Between Foreigners.

Greek seaman's SDNY action against Panamanian shipowner for injuries sustained on its Greek-flag vessel on the high seas will be dismissed on *forum non conveniens* grounds where plaintiff failed to prove that shipowner was controlled from N.Y. by American citizens.

LEBOVICI & SAFIR, *for Plaintiff*.

POLES, TUBLIN, PATESTIDES & STRATAKIS (ALAN VAN PRAAG), *for Defendants*.

CHARLES M. METZNER, D. J.:

Defendants move for dismissal of the complaint and for summary judgment on the ground of lack of jurisdiction, failure to state a claim upon which relief may be granted, improper service, and upon the further grounds of *forum non conveniens*.

This action was brought by a Greek seaman to recover for injuries allegedly sustained on June 19, 1972, aboard the S.S. *Eurybates* owned by defendant Cia. Maritima San Basilio, S.A. At the time of this incident, the *Eurybates* was in the Pacific Ocean en route to the Far East.

Appendix A

The affidavits submitted by the parties establish that the contacts of the defendants with the United States as measured by the standards set forth in *Lauritzen* v. *Larsen*, 345 U.S. 571, 1953 AMC 1210 (1953), are minimal. The only United States contact in this case is the presence here of defendant P. D. Marchessini & Co. (New York), Inc., which acted as a ship's agent while Cia. Maritima San Basilio, S.A. vessels were in United States ports.

The S. S. *Eurybates* is a Greek flag vessel owned by a Panamanian corporation. Plaintiff is a Greek citizen presently residing in Greece. He signed on board the *Eurybates* in Rotterdam, pursuant to Greek ship's articles which provide for disputes to be settled according to Greek law. All the witnesses are foreign nationals. Plaintiff was treated for his injuries in Japan.

The evidence submitted by plaintiff is not sufficient to support its claim that the shipping line is controlled by American citizens from New York. In fact, plaintiff has failed to distinguish the facts relating to the ownership and operation of the *Eurybates* by Cia. Maritima San Basilio, S. A. from those found to be true concerning its ownership and operation of another vessel in *Garis* v. *Compania San Basilio, S.A.*, 1968 AMC 204, 386 F.2d 155 (2 Cir., 1967).

The action is dismissed on the ground of *forum non conveniens* on condition that (1) defendants submit to the jurisdiction of the Greek courts; and (2) waive any defense of the statute of limitations as to any claim against them.

So ordered.

APPENDIX B

§ 804. Federal Maritime Commission; rules and regulations for filing of rates and charges for barging and affreighting of containers or containerized cargo by barges within United States

Notwithstanding part III of the Interstate Commerce Act, as amended, or any other provision of law, rates and charges for the barging and affreighting of containers or containerized cargo by barge between points in the United States, shall be filed solely with the Federal Maritime Commission in accordance with rules and regulations promulgated by the Commission where (a) the cargo is moving between a point in a foreign country or a noncontiguous State, territory, or possession and a point in the United States, (b) the transportation by barge between points in the United States is furnished by a terminal operator as a service substitute in lieu of a direct vessel call by the common carrier by water transporting the containers or containerized cargo under a through bill of lading, (c) such terminal operator is a Pacific Slope State, municipality, or other public body or agency subject to the jurisdiction of the Federal Maritime Commission, and the only one furnishing the particular circumscribed barge service in question as of January 2, 1975, and (d) such terminal operator is in compliance with the rules and regulations of the Federal Maritime Commission for the operation of such barge service. The terminal operator providing such services shall be subject to the provisions of this chapter.

Pub.L. 93–605, § 2(a), Jan. 2, 1975, 88 Stat. 1966.

§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc., by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be ap-

proved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without

prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be subject to a civil penalty of not more than $1,000 for each day such violation continues: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; Ex.Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; Oct. 3, 1961, Pub.L. 87–346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub.L. 88–275, 78 Stat. 148; Aug. 29, 1972, Pub.L. 92–416, § 1(a), 86 Stat. 653.

§ 817. Carriers in interstate commerce to establish, observe, and enforce reasonable rates and regulations; carriers and foreign commerce to file tariffs of rates and charges

(a) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier

is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

(b)(1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in this paragraph, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however,* That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tarriffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or chargts so specified, nor etxend or deny to any person any privilege or facility, except in accordance with such tariffs: *Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such car-

riers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which,

after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

(6) Whoever violates any provision of this section shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

Sept. 7, 1916, c. 451, § 18, 39 Stat. 735; Ex.Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; Oct. 3, 1961, Pub.L. 87–346, § 4, 75 Stat. 764; Aug. 22, 1963, Pub.L. 88–103, 77 Stat. 129; Oct. 30, 1965, Pub.L. 89–303, 79 Stat. 1124; Apr. 29, 1968, Pub.L. 90–298, 82 Stat. 111; Aug. 29, 1972, Pub.L. 92–416, § 1(c), 86 Stat. 653.